

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Expanding the Economic and Innovation)	Docket No. 12-268
Opportunities of Spectrum Through Incentive)	
Auctions)	

**REPLY COMMENTS OF
CAPITOL BROADCASTING COMPANY, INC.**

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Summary

Low power television stations, such as Capitol's WILM-LD, the CBS affiliate in Wilmington, North Carolina, provide valuable service to the public, including a mix of news, entertainment, and emergency weather reporting. The Spectrum Act does not contemplate that LPTV stations are to be removed from serving the public in a wholesale fashion. Certainly the spirit of the Act is to preserve local broadcasting to the greatest extent possible, while freeing up spectrum for wireless broadband use only through the voluntary relinquishment of broadcast licenses.

The Commission should make every effort to preserve LPTV service. Among the ways this can be accomplished is for the Commission to adopt procedures for LPTV stations to submit displacement applications that ease the burdens of the impact of repacking on LPTV stations. In particular, the Commission can open a special filing window for LPTV stations and waive its requirements that a displacement application for a new channel must demonstrate interference caused to or received from a primary station and be submitted only after the primary station obtains a construction permit or license, just as it did during the DTV transition. The Commission should also conduct a separate proceeding to establish a set of "selection priorities" for displacement applications. LPTV stations filing during the initial filing window would be required to show that they qualify for particular selection priorities, and the Commission would rank the displacement applications in order to determine which application to grant where the application of engineering criteria would otherwise create a mutual exclusivity.

Capitol endorses the two-stage reimbursement process advocated by the National Association of Broadcasters ("NAB") pursuant to which stations receive an upfront advance payment of estimated expenses at or about the time that stations file their construction permit

applications, followed by a true-up stage during which stations file supporting documentation of actual expenses and receive additional payment in order to be made whole.

In addition to full reimbursement for actual repacking expenses, the Commission should also consider the opportunity costs imposed upon broadcasters that are involuntarily affected by the repacking. While the spectrum recovered in this proceeding will benefit carrier spectrum holdings, it will not, ultimately, be a full solution to the purported spectrum crunch, but the repacking necessitated by this proceeding will certainly constitute a distraction to committed broadcasters, such as Capitol, that are seeking to develop and deploy cutting-edge technology and business models to meet the demands of 21st century consumers. Every hour spent on involuntary mandatory repacking is an hour that is not spent on the real business of broadcasting, including maximizing the potential of television broadcast spectrum. The Commission should allow reimbursement for such opportunity costs to the extent they are appropriately documented.

Contrary to a recent report in the trade press that Commission staff perceive there to be broad consensus that any reclaimed spectrum be auctioned in the forward auction in economic areas (“EAs”) or larger geographic areas, several commenters propose—and Capitol agrees—that the reclaimed spectrum should be sold and licensed by the smaller cellular market areas (“CMAs”). Indeed, to satisfy the statutory mandate that the Commission “*promot[e] economic opportunity and competition* and ensur[e] that new and innovative technologies are readily accessible to the American people by *avoiding excessive concentration of licenses* and by disseminating licenses among *a wide variety of applicants*, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women,” 47 U.S.C. § 309j(3)(B) (emphases added), the Commission must license some portion of the reclaimed and repurposed spectrum in small geographic areas.

Licensing by CMAs would offer essential, positive results, including fostering competition, allowing participation of small market entrants, raising greater auction revenue, encouraging local service by licensees, and allowing flexibility for varied business plans of bidders of all sizes. Past auction history, including Auction No. 66 and Auction No. 44, bears this out. Without the use of CMAs, smaller entities—including, possibly, Capitol—would be excluded from participation because the prices for EA or larger regional licenses will be prohibitively expensive. Smaller licensing areas will also facilitate the faster deployment of new services. An entity such as Capitol that is able to bid successfully on one or more discrete CMAs is likely to commence service more quickly in the smaller area because the overall capital input and infrastructure needs of a smaller area are, by definition, less than the needs of a larger area.

In any event, and no matter what size areas the Commission ultimately uses, all winning bidders should be subject to a use-it-or-lose-it period to ensure that all auctioned spectrum is quickly put to use and does not lay fallow or is otherwise warehoused. In light of the purported “spectrum crunch,” it would be reasonable for the Commission to require winning bidders to put spectrum to use within a period of four years following the close of the forward auction.

Finally, the Commission should continue the practice of leaving open the auction for all CMAs and other license areas for as long as the bidding remains active in any license area. This was a successful approach in Auction No. 73 where the Commission applied a simultaneous stopping rule.

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Capitol Broadcasting Company, Inc. (“Capitol”)¹ submits these reply comments in response to the Notice of Proposed Rulemaking (“*Notice*”), released October 2, 2012,² seeking comment on the Commission’s implementation of Title VI of the Middle Class Tax Relief and Job Creation Act of 2012 (the “Spectrum Act” or “Act”).³

¹ Capitol owns and operates four full power television stations and one low power television station serving various communities in North Carolina and South Carolina. Capitol has long been a leader in integrating new technologies in broadcasting. For example, Capitol’s station, WRAL-TV, Raleigh, North Carolina, was granted the nation’s first experimental authorization to broadcast a digital television signal in 1996 and became the first commercial television station to broadcast an HDTV signal. WRAL-TV was also the first station to offer free, over-the-air broadcasting to mobile devices, commencing service to television screens installed in Raleigh city buses in June 2009. In addition, Capitol has been an early innovator in streaming its stations’ local news broadcasts over the Internet. And, recently, WRAL-TV served as a test case for the feasibility of mobile EAS technology.

² See *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking, FCC 12-118 (released Oct. 2, 2012) (“*Notice*”).

³ See PUB. L. NO. 112-96, 125 Stat. 156 (2012).

I. Low Power Television Stations, Such As Capitol's WILM-LD, Wilmington, North Carolina, Provide Valuable Local Service, and the Commission Should Make Appropriate Accommodations to Preserve Low Power Service During and After the Repacking Process

In response to the *Notice* seeking comment on the impact of the spectrum incentive auction on low power television and television translator stations (collectively, "LPTV stations"), a number of commenters have observed that LPTV stations provide valuable service to the public and that that service may be severely impacted by the repacking process.⁴

Capitol owns and operates WILM-LD, Wilmington, North Carolina. WILM is the sole CBS affiliate licensed to the Wilmington DMA. According to Nielsen Media Research's four books average for 2012, WILM was ranked either #1 or #2 in viewership in the market in seven different categories. The Wilmington DMA, ranked 132, contains more than 190,000 television households. In addition to CBS network programming, WILM also broadcasts news and sports programming of interest to the viewers of its local market, as well as comprehensive emergency weather reporting in a coastal community subject to hurricanes each year. Wilmington was also the first television market to convert to digital television service, turning off analog broadcasting on September 8, 2008, in an early run-through for the national DTV transition, and WILM was an essential participant in that test case.⁵

The repacking process could severely impact WILM, potentially forcing the station off

⁴ See, e.g., Comments of ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates at 54-55; Comments of Gray Television, Inc. at 8; Comments of Weigel Broadcasting Company; Comments of Globe LPTV LLC; Comments of the National Translator Association; Comments of the Advanced Television Broadcasting Alliance.

⁵ See Federal Communications Commission, *News Release*, "DTV Transition Premiers in Wilmington, North Carolina" (May 8, 2008).

the air and harming the public that has come to rely on WILM's local, network, public affairs, and emergency weather programming. At this time, of course, because the spectrum clearing process, and the demand for spectrum in the forward auction and the supply of spectrum vacated by existing television licensees, remains unknown, it would be premature for the Commission to take any action that could have crippling effects on LPTV service without fully understanding what those effects could be.

As the Commission begins to consider those effects, due consideration should be given to the full intent of the Spectrum Act. While the Act only expressly requires the Commission to "make all reasonable efforts to preserve . . . the coverage area and population served" of each full power and Class A television licensee,⁶ that requirement is certainly reflective of the overall congressional intention of the Act to preserve existing broadcast service. Indeed, Congressman Joe Barton recently expressed his belief that Congress intended to protect *all* licensed TV broadcasters, including LPTV stations, in the Spectrum Act.⁷

The Commission can help preserve valuable LPTV service while freeing up broadcast spectrum for wireless use. *First*, it must proceed very deliberately with LPTV issues, acknowledge the valuable service provided by thousands of LPTV stations throughout the

⁶ Spectrum Act, § 6403(b)(2).

⁷ See *Keeping the New Broadband Spectrum Law on Track: Hearing Before the H. Comm. on Energy & Commerce*, 112th Cong. (Dec. 12, 2012) (statement of Rep. Joe Barton), available at <<http://energycommerce.house.gov/hearing/keeping-new-broadband-spectrum-law-track>> (beginning 1:25:22) ("I didn't envision that we would have the end result that a low power television station would simply end up off the air. And so, I would like to ask the Chairman and the other Commissioners if, in fact, you are willing to commit that low power television stations that have acted in good faith—they understand that they might have to move, or be repacked—but I personally believe it's not fair at all if the end result is that a low power television station, that has been a good licensee, ends up totally off the air.").

country, and strive to implement innovative ways to preserve this service in a much tighter broadcast band after repacking.

Second, at the appropriate time, the Commission can adopt procedures for LPTV stations to submit displacement applications that ease the burdens of the impact of repacking on LPTV stations. In particular, the Commission can open a special filing window for LPTV stations and waive its requirements that a displacement application for a new channel must demonstrate interference caused to or received from a primary station and be submitted only after the primary station obtains a construction permit or license,⁸ just as it did during the DTV transition.⁹ This approach would allow LPTV stations filing in the window to be considered “cut off” from competing applications as of the last day of the filing window and thus protect them from having to wait until interference from a full power or Class A television station actually occurs before they can be permitted to file. The Commission can also prioritize the processing of such applications over that of previously-filed new station and modification applications filed by other low power television and translator stations.¹⁰

Third, and also at a later, more appropriate time, the Commission can adopt measures to help avoid mutual exclusivity for displacement applications filed by LPTV stations within the

⁸ See 47 C.F.R. § 73.3572.

⁹ See *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Sixth Report and Order, 12 FCC Rcd 14588 (1997) (“*DTV Sixth Report and Order*”), at ¶ 141 (“in providing all full service TV stations with a second DTV channel, it will be necessary to displace a number of LPTV and TV translator operations, especially in the major markets”).

¹⁰ See 47 C.F.R. §§ 73.3572(a)(4), 74.787(a)(4).

proposed displacement application window.¹¹ As noted in the *Notice*, consistent with the requirements of Section 309(j) of the Communications Act, the Commission's rules require resolution of mutual exclusivity through competitive bidding.¹² The Communications Act, however, provides that the Commission shall use threshold qualifications and other means to avoid mutual exclusivity where the Commission determines that doing so would serve the public interest.¹³ This provision has been interpreted by the courts as providing the Commission discretion in implementing priorities that serve and maximize the public interest.¹⁴

Given the framework of existing policies favoring the availability of free over-the-air television service on a ubiquitous basis, and given the Commission's prior efforts in the context of the DTV transition to ensure the ongoing viability of LPTV service,¹⁵ the public interest would be served by the Commission conducting a separate proceeding to establish a set of "selection priorities" for displacement applications. Under this approach, LPTV stations filing during the initial filing window would be required to show that they qualify for particular selection priorities, and the Commission would rank the displacement applications in order to determine which application to grant where the application of engineering criteria would

¹¹ See *Notice* at ¶ 361.

¹² See 47 C.F.R. § 73.5000 *et seq.*

¹³ See 47 U.S.C. § 309(j)(6)(E).

¹⁴ See, e.g., *Bachow Communs., Inc. v. FCC*, 237 F.3d 683, 691-692 (D.C. Cir. 2001) ("Subsection (j)(6)(E) affirms Congress' view that statutory competitive bidding authority does not wholesale replace 'engineering solutions, negotiation . . . and other means' to avoid mutual exclusivity."); *Benkelman Telephone Co. v. FCC*, 220 F.3d 601, 606 (D.C. Cir. 2000) (Section 309(j)(6)(E) "imposes an obligation only to minimize mutual exclusivity 'in the public interest' and 'within the framework of existing policies.'").

¹⁵ See, e.g., *DTV Sixth Report and Order* at ¶¶ 141-147.

otherwise create a mutual exclusivity. Establishing such selection priorities now, at this early point in the spectrum auction and repacking processes, is fraught with many difficulties and complexities that may sort themselves out as those processes move forward. For example, some LPTV stations that originate programming may be the only local, over-the-air service in their community of license. Other LPTV stations, such as Capitol's WILM, originate programming and constitute the primary network affiliate in their local television market of one of the ABC, CBS, FOX, or NBC television networks.¹⁶ Finally, yet other LPTV stations, such as Capitol's W24DP-D,¹⁷ already have outstanding digital construction permits, while other LPTV stations do not.

While Capitol urges the Commission to adopt appropriate selection priorities to avoid or minimize MXed displacement applications, the Commission should initiate the necessary independent rulemaking proceeding after a new DTV Table of Allotments is announced and a fuller extent of the impact of repacking on LPTV stations is known.

II. Involuntary Repacking Will Saddle Committed Broadcasters with Opportunity Costs That Affect Their Businesses

The Spectrum Act requires reimbursement of costs reasonably incurred by full power and

¹⁶ See *Notice* at ¶ 361 (seeking comment on whether priority should be granted to applicants that provide the only network service to their communities).

¹⁷ Construction of Capitol's Channel 24 digital low power station has been hindered by the lack of certainty surrounding the future of LPTV stations. Construction of the facility now runs the risk of the loss of a substantial investment, while waiting to construct runs the risk of expiration of the permit and the loss of the opportunity to provide new service. To echo the sentiment of another commenter: "We have been burdened with two choices: lose our privilege of constructing through expiration, or invest without knowing the expectation of how the FCC's decisions will impact our investments." EICB-TV East, LLC, *Ex Parte Notice* (filed Jan. 21, 2013), at 2.

Class A television stations subject to involuntary repacking. Capitol supports the two-stage reimbursement process advocated by the National Association of Broadcasters (“NAB”) pursuant to which stations receive an upfront advance payment of estimated expenses at or about the time that stations file their construction permit applications, followed by a true-up stage during which stations file supporting documentation of actual expenses and receive additional payment in order to be made whole.¹⁸ Capitol believes that the NAB plan is fair and equitable to all stations, provides advance funds to help with the capital needs of stations for repacking, and accounts for the very real differences in costs that different stations will face depending on the degree to which the repacking individually affects them.

Capitol also agrees with NAB that eligible broadcaster costs should be defined broadly.¹⁹ NAB has submitted a non-exclusive list of the types of expenses that stations may encounter.²⁰ But a matter that NAB does not include in its non-exclusive list, and one that the Commission should consider, is the real opportunity costs broadcast stations that choose to continue broadcasting will face as a result of mandatory repacking.

For example, the Commission is well-aware of Capitol’s reputation as an innovator in broadcasting.²¹ Capitol is constantly exploring new opportunities to develop broadcast technologies that will bring better services to local viewers. One such opportunity lies in harnessing the potential of broadcasting to deliver the most popular video content to consumers

¹⁸ See Comments of NAB at 53-54.

¹⁹ See Comments of NAB at 55-59.

²⁰ See Comments of NAB at Attachment A.

²¹ See note 1, *supra*.

on an anytime, anywhere basis.

There can be no question that a chief impetus for this proceeding and the spectrum auctions is to facilitate wireless broadband delivery of mobile video. The Cisco mobile data traffic forecasts are well known.²² But, as Capitol has previously argued to the Commission,²³ mobile DTV already has the capability to accommodate a substantial portion of mobile video demand requirements in a spectrally efficient manner. Wireless carriers and broadcasters can and should be working together to leverage the benefits of broadcast technologies to deliver video content in concert with wireless broadband services. Just as wireless carriers already seek to offload as much content to Wi-Fi networks as feasible (and continue to explore greater offloading opportunities to femtocells), so, too, can high demand video content be offloaded to broadcasters. Wireless carriers will never be able to satisfy all mobile video traffic demands with millions of point-to-point two-way unicast sessions when the most popular video content—primarily broadcast television content—can be delivered far more efficiently to mobile devices by reliance on point-to-multipoint television broadcasting.

Thus, while the spectrum recovered in this proceeding will benefit wireless carrier spectrum holdings, it will not be a full solution to the purported spectrum crunch. Inasmuch as this proceeding will require mandatory repacking of television stations not participating in the reverse auction, such repacking constitutes a distraction to committed broadcasters, such as Capitol, that are seeking to develop and deploy cutting-edge technology and business models to

²² See, e.g., *Cisco Visual Networking Index: Global Mobile Data Traffic Forecast Update, 2012-2017* (Feb. 6, 2013), available at <http://www.cisco.com/en/US/solutions/collateral/ns341/ns525/ns537/ns705/ns827/white_paper_c11-520862.pdf>.

²³ See Comments and Petition for Rulemaking of Capitol Broadcasting Company, ET Docket No. 10-235 (Mar. 18, 2011).

meet the demands of 21st century consumers. Indeed, every hour spent on mandatory repacking is an hour that is not spent on the real business of broadcasting, including maximizing the potential of television broadcast spectrum. These opportunity costs are real. Capitol urges the Commission to allow reimbursement for such opportunity costs to the extent they are appropriately documented.

III. The Commission Should Use Cellular Market Areas in the Forward Auction

Generally, the Communications Act expressly directs that, through implementation of competitive auctions, the Commission must:

*promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women.*²⁴

The Commission is further directed by Congress to ensure “an equitable distribution of licenses and services among geographic areas.”²⁵ The Spectrum Act did not override these existing directives and limitations, which have been part of the Communications Act for more than 15 years. In order to satisfy these statutory mandates in the Communications Act and to ensure a successful, profitable auction, the Commission must license some portion of the reclaimed and repurposed spectrum in small geographic areas. For the reasons discussed below, Capitol urges the Commission to reject the blanket approach of licensing by economic area (“EA”) or larger geographic areas, and, instead, adopt the approach of licensing by cellular market area (“CMA”),

²⁴ 47 U.S.C. § 309j(3)(B) (emphases added).

²⁵ 47 U.S.C. § 309j(4)(C)(i).

as has been urged by other commenters.²⁶

Capitol urges the Commission to conduct the auctions according to CMAs during the forward auction phase, rather than according to larger blocks such as EAs or regional economic area groupings (“REAGs”).²⁷ Conducting the auctions in larger blocks—such as the proposed EA licensing—would compromise the express and unmistakable purpose of and procedural protections imposed by Congress. Licensing exclusively by larger blocks would disfavor competition, exclude small market entrants, and discourage deployment of important services in rural and less densely populated areas, effectively violating the Communications Act.²⁸ Allowing more focused auctions according to CMAs ensures both successful auctions and satisfaction of the Act’s directives. Capitol contends that auction licensing by CMAs would offer essential, positive results, including fostering competition, allowing participation of small

²⁶ See, e.g., Comments of The Wireless Internet Service Providers Association (“WISPA”); Comments of United States Cellular Corporation (“U.S. Cellular”). It has been reported that Commission staff believes there to be “broad consensus spectrum should be auctioned in economic area-sized blocks.” Howard Buskirk, *Sequestration Won’t Slow FCC Work on Incentive Auction, Lake Says*, COMM. DAILY (Feb. 27, 2013), at 4 (paraphrasing Wireless Bureau Chief Ruth Milkman). The comments filed by WISPA and U.S. Cellular in this proceeding make plain that there are numerous parties urging the Commission to auction at least some of the spectrum in CMA-sized blocks. The number of parties taking this position numbers in the hundreds, as WISPA’s comments reflect the views of its 700+ members, see WISPA Comments at 2. Capitol adds its voice in support of smaller CMA-sized blocks.

²⁷ See Notice at ¶¶ 148-49 (“We propose to license the 600 MHz band on an EA basis and seek comment on this approach. . . . We also seek comment on whether we should use geographic areas other than EAs . . . and the reasons why using these geographic license sizes are more advantageous than using EAs.”).

²⁸ As noted above, the Act expressly requires the Commission to “promote (i) an equitable distribution of licenses and services among geographic areas, (ii) economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, and . . . ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services.” 47 U.S.C. 309(j)(4)(C)-(D).

market entrants, raising greater auction revenue, encouraging local service by licensees, and allowing flexibility for varied business plans of bidders of all sizes. And the Commission's own auction history bears this out:

In determining the size of service areas, the Commission has stated as a general principle that it will consider "licensing the spectrum over a range of various sized geographic areas, including smaller service areas such as MSAs/RSAs [CMAs], where consistent with the record in that proceeding and with other factors that may be relevant to the spectrum." Many commenters, including small and regional service providers and entities that represent rural interests, favor an approach that would provide for a variety of license sizes beyond those in the current band plan. We agree with those commenters who observe that a revised mix of smaller license sizes would provide a more balanced set of initial licensing opportunities at this time and make available more licenses to match the needs of different potential users. The opportunities afforded by providing licenses with a mix of geographic areas were seen in the results of Auction No. 66 involving AWS-1 licenses, where many different bidders won smaller and mid-sized licenses, such as CMAs and EAs. The same policy of providing a mix of licenses that balances competing interests is appropriate here. These revisions will advance the Commission's statutorily directed goals to promote service to rural areas, promote investment in and the rapid deployment of new technologies and services, avoid the excessive concentration of licenses, and provide for the dissemination of licenses among a wide variety of applicants.²⁹

The benefits of CMA licensing are well-supported by the results of past auctions and by other commenters in this proceeding. Indeed, commenters from several industries agree that CMA licensing is a desirable and necessary parameter for auction licensing. For example, The Wireless Internet Service Providers Association ("WISPA") encourages the Commission to

²⁹ *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Second Report and Order, 22 FCC Rcd 15289 (2007), at ¶ 43 (alteration in original) (footnotes and citations omitted).

license at least two contiguous blocks of reclaimed spectrum according to CMAs.³⁰ Capitol agrees with this proposal—Capitol believes that licensing by CMA is the best approach overall but acknowledges that a viable compromise would be to auction *both* larger EA licenses and smaller CMAs in every region. In other words, the Commission should auction paired (uplink and downlink) blocks of spectrum for EA licenses on the one hand and for CMA licenses on the other, with both offered in all parts of the country. Such an approach would be consistent with the auction approach of the 700 MHz spectrum in 2008.³¹

United States Cellular Corporation (“U.S. Cellular”) also recognizes the importance of designating small geographic areas for these and other reasons vital to the success of the auction. U.S. Cellular notes—and Capitol agrees—that auctions by CMA are not only desirable but crucial in order to allow more small market entrants and encourage local service: “These small license areas are necessary to preserve opportunities for small and regional carriers, as well as *new entrants*, to provide an important source of competition, variety, and diversity”³² With its strong tradition of innovation, Capitol is actively considering its own potential options with respect to participation in the forward auction.³³

Moreover, favorable results have stemmed from CMA licensing in past auctions. For example, as U.S. Cellular observes with respect to AWS-1 licenses, almost half of the CMA

³⁰ See Comments of WISPA at 30.

³¹ See *Auction of 700 MHz Band Licenses Scheduled for January 24, 2008*, Public Notice, 22 FCC Rcd 18141 (2007), at ¶ 12.

³² Comments of U.S. Cellular at 11 (emphasis added).

³³ Capitol’s efforts in this regard would likely be further along if it were not required to divert resources to consider and address the panoply of repacking issues presented in this proceeding. See *supra* Section II.

licenses auctioned in Auction No. 66 were acquired by smaller entities while more than two-thirds of the larger regional licenses in the same auction were won by national wireless providers.³⁴ Similarly, U.S. Cellular also observes that the bidding activity in Auction No. 44 for license Blocks C and D in the Lower 700 MHz band demonstrated more participation by small companies bidding for CMA licenses.³⁵ It is clear from these examples that CMA licensing is necessary—and preferable to EA licensing—to avoid concentration of licenses in the hands of the too few national carriers.

Notably, CMA license auctions also produced more *revenue* due to this increased participation than bids for larger blocks. Other commenters correctly argue, and Capitol agrees, that the use of CMAs in the spectrum auction will “invite more participation in the auction, not less, which would tend to drive up auction revenues.”³⁶ A recent study finding larger geographic definitions generally correlate with lower license values provides additional support for this notion.³⁷

Capitol agrees with the proposition that “the use of CMAs would allow more targeted

³⁴ See Comments of U.S. Cellular at 19; *see also Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, Second Report and Order, 22 FCC Rcd 15289 (2007), at ¶ 43 (favorably observing the results of Auction No. 66 when a mix of licensing opportunities, including CMAs, were offered).

³⁵ See Comments of U.S. Cellular at 19.

³⁶ Comments of WISPA at 31; *see also* Comments of The Rural Telecommunications Group, Inc. at 3 (“For example, B Block CMA licenses in Auction 73 (700 MHz spectrum) commanded a higher price on a net price per population basis than the EA and [REAG] based licenses in the same auction.”).

³⁷ See Scott Wallsten, Technology Policy Institute, *Is There Really A Spectrum Crisis? Quantifying The Factors Affecting Spectrum Value* (Jan. 23, 2013), at 22 (“Smaller geographic definitions allow bidders to more selectively bid on areas they value.”), *available at* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2206466>.

spectrum acquisition and result in greater efficiencies for both large and small applicants, while not discriminating in favor of any single business plan. It would allow bidders to acquire precise locations without also acquiring—and excluding other carriers from serving—those additional areas that would otherwise accompany the target locations in a larger license area.”³⁸ Indeed, small license areas benefit carriers and new entrants of all sizes and in all markets by allowing them to take a building block approach and assemble as much coverage area as needed. Other commenters agree with this concept.³⁹ Indeed, there is no other mechanism in the auction for bidders to divide or partition geographic areas that are too large, and such repairs may be difficult—if not impossible—after the fact.⁴⁰ In other words, if the auction blocks are too big at the outset, it will be too late.

Further, the use of CMAs will allow smaller carriers and other innovators that serve or wish to provide new services to consumers to acquire spectrum and deploy broadband and related services in various markets. Without the use of CMAs, such entities—including, possibly, Capitol—would be excluded from participation because of the “prohibitively high prices associated with nationwide or large regional licenses.”⁴¹ The Commission has previously

³⁸ Comments of U.S. Cellular at 11.

³⁹ *See, e.g.,* Comments of U.S. Cellular at 15; Comments of The Rural Telecommunications Group, Inc. at 3.

⁴⁰ *Accord* Comments of U.S. Cellular at 15 (“Although the Commission proposes to permit 600 MHz band licenses to be partitioned, disaggregated, or leased, such divestitures have been, and likely will continue to be, the exception rather than the rule. As a consequence, the theoretical availability of these secondary market transactions is unlikely to provide small and regional carriers with timely or adequate access to spectrum.”).

⁴¹ Comments of U.S. Cellular at 14; *see also* Comments of The Rural Telecommunications Group, Inc. at 3-5.

recognized that CMAs “permit entities who are only interested in serving rural areas to acquire spectrum licenses for these areas alone and avoid acquiring spectrum licenses with high population densities that make purchase of license rights too expensive for these types of entities.”⁴² In contrast, auctions by larger blocks would disadvantage smaller market players, and, in turn, consumers, while the biggest wireless spectrum licensees would benefit.⁴³ Moreover, CMAs are also familiar units to business entities across various industries, including among smaller and regional providers: As WISPA points out, “CMAs more closely approximate [the] service territories [of wireless internet service providers].”⁴⁴

Smaller licensing areas should facilitate the faster deployment of new services. An entity such as Capitol that is able to bid successfully on one or more discrete CMAs is likely to commence service more quickly in the smaller area because the overall capital input and infrastructure needs of a smaller area are, by definition, less than the needs of a larger area. In any event, and no matter what size areas the Commission ultimately uses, all winning bidders should be subject to a use-it-or-lose-it period to ensure that all auctioned spectrum is quickly put

⁴² *Service Rules for Advanced Wireless Service in the 1.7 GHz and 2.1 GHz Bands*, Report and Order, 18 FCC Rcd 25162 (2003), at ¶ 39; *see also Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, Report and Order, 17 FCC Rcd 1022 (2002), at ¶ 96.

⁴³ Capitol urges the Commission to consider U.S. Cellular’s projection that “deployment of the innovative and advanced types of services made possible by the 600 MHz spectrum would likely be significantly delayed, if not precluded entirely, if the Commission licenses this spectrum on a nationwide or large regional basis.” Comments of U.S. Cellular at 14.

⁴⁴ Comments of WISPA at 31; *see also* Comments of U.S. Cellular at 11; *Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, Report and Order, 17 FCC Rcd 1022 (2002), at ¶ 96 (“These smaller areas also may correspond to the needs of many customers, including customers of small regional and rural providers.”).

to use and does not lay fallow or otherwise become warehoused⁴⁵—in light of the purported “spectrum crunch,” it would be reasonable for the Commission to require winning bidders to put spectrum to use within a period of four years following the close of the forward auction.⁴⁶ After all, the Communications Act’s existing competitive bidding provisions set as an objective “the development and *rapid* deployment of new technologies, products, and services”⁴⁷—a goal shared by Capitol.

Finally, licensing by CMAs in the forward auction has the potential to favorably impact the television repacking phase. As demonstrated by U.S. Cellular in its comments, licensing by CMAs will allow the FCC to repack stations more efficiently and, thus, license more spectrum at

⁴⁵ As NAB has previously advised Congress, spectrum warehousing by Dish Network and others has been occurring for years. See, e.g., Phil Kurtz, *NAB Asks Congress for Independent Review of Spectrum Hoarding, Speculation*, Broadcast Engineering (Mar. 3, 2011), available at <<http://broadcastengineering.com/news/nab-asks-congress-for-independent-review-of-spectrum-hoarding-speculation-0303>>; see also DailyWireless.org, *Phoney Spectrum Scarcity* (“Cable operators are sitting on \$2.4B in AWS spectrum—just speculating the price will appreciate. . . . Telcos paid over \$15 billion for spectrum they are not using.”), available at <<http://www.dailywireless.org/2010/06/18/phoney-spectrum-scarcity/>>. And recent industry reports make clear that Dish appears to have continued the practice into 2013. See, e.g., Andy Fixmer, *Dish to Sell Wireless Spectrum If Network Plans Fail*, Bloomberg.com (Feb. 12, 2013) (“Dish has ‘billions of dollars of spectrum’ that could become available” (quoting Dish CEO Charlie Ergen)), available at <<http://www.bloomberg.com/news/2013-02-12/dish-to-sell-wireless-spectrum-if-network-plans-fail.html>>.

⁴⁶ Here, the Commission should continue the practice of leaving open the auction for all CMAs and other license areas for as long as the bidding remains active in any license area. This was a successful approach in Auction No. 73 where the Commission applied a simultaneous stopping rule. See *Auction of 700 MHz Band Licenses Scheduled for January 24, 2008*, Public Notice, 22 FCC Rcd 18141 (2007), at ¶ 181 (“A simultaneous stopping rule means that all licenses remain available for bidding until bidding closes simultaneously on all licenses.”). Under such an approach, the forward auction would not close in any market any earlier than the end of all bidding on all license areas.

⁴⁷ 47 U.S.C. § 309j(3)(B) (emphasis added).

reduced risk of potential interference with nearby broadcast television spectrum.⁴⁸

Conclusion

For the foregoing reasons, Capitol respectfully submits that the Commission should preserve, to the greatest extent possible, LPTV service both during and after the repacking process; adopt the NAB's reimbursement process proposal but consider the opportunity costs the repacking process will burden broadcasters with; utilize cellular market areas for bidding on spectrum blocks in the forward auction; and impose a use-it-or-lose-it requirement on winning bidders in the forward auction, regardless of the geographical size of licenses.

Respectfully submitted,

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⁴⁸ See Comments of U.S. Cellular at 12-13, Attachment A; *id.* at 13 (“CMA-based licensing, as compared to using EA license areas, would greatly increase the number of markets that would have 85 MHz of spectrum, or significantly more, available through repacking alone.”).